IN THE
SUPREME COURT OF THE UNITED STATES
December Term, 1980

NO. 80-5920

VICTOR E. GOODE, APPELLANT

vs

STATE OF OHIO, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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Victor E. Goode, the Appellant, appeals from the final judgment of the Supreme Court of Ohio, dated September 12, 1980, sua sponte, dismissing the appeal on the grounds that no substantial Constitutional question existed. This holding denied the Appellant his right to confront witnesses and due process of law in violation of the Sixth and Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The dismissal by the Supreme Court of Ohio, which appears in the Appendix hereto, p. 3, infra., is unreported.

That dismissal, in essence, affirmed the Second Appellate District Court of Appeals Decision rendered on the 15th day of April, 1980, p. 8, infra. That decision was the second decision entered by that Court. The first decision rendered by the Court of Appeals was a limited reversal, p. 16, infra., rendered on April 24, 1979. The original appeal was as a result of a guilty finding entered in the Common Pleas Court of Greene County on June 14, 1978, p. 29, infra.

JURISDICTION

The judgment of the Supreme Court of Ohio, dismissing the appeal, was entered on September 12, 1980, See p. 3 , infra.

A supplemental Notice of Appeal to this Court was duly

filed in the Supreme Court of Ohio on November 6, 1980. See p. 1, infra.

This appeal is being docketed with this Court within 90 days from the dismissal of the appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments to the United States Constitution confer upon the Defendant the right to use the transcript testimony of the chief prosecution witness taken in a co-Defendant's juvenile trial for his use during preparatory and trial stages of a criminal proceeding. Also whether Ohio's "rape shield statute", O.R.C. §2907.02(D) is unconstitutional on its face in that evidence relevant to the issue of consent and state of mind of the prosecuting witness, such evidence which was not directed at "specific" intances of sexual activity or opinion or reputation evidence of victim's sexual activity should not be excluded due to the protection of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Criminal Rule 16(B)(1)(g):

In Camera Inspection of Witness' Statement. Upon completion of a witness' direct examination at trial, the court, on motion of the Defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist, the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Ohio Juvenile Rule 37:

(A) Recording of Hearings. In all juvenile court hearings, upon request of a party or upon the court's own motion, a complete record of all testimony, or other oral proceedings shall be taken in shorthand, stenotype or by any other adequate mechanical or electronic recording device.

(B) Restriction on Use of Recording or Transcript. No public use shall be made by any person, including a party, of

any Juvenile Court hearing, including the recording or a transcript thereof, of any Juvenile Court hearing, except in the court of an appeal or as authorized by order of the court.

Ohio Revised Code §2907.02(D):

Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim or is admissible against the defendant under §2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

RAISING THE FEDERAL QUESTION

Prior to trial, defense counsel questioned the constitutionality and applicability of Ohio's rape shield statute, R.C.§2907.02 (D) as to certain proffered testimony, p. 34, infra. At trial, defense was denied the use of said testimony, per the aforementioned statute, in direct contravention of Appellant's right to present a full and adequate defense.

Defense had also, prior to trial, requested the juvenile court transcript of the trial of the co-defendant. This request was denied on the basis of Juv. R. 37 as was defense's later request to have the transcript made part of the record for appeal.

These denials constitute reversible error in light of the direct infringement upon Appellant's Constitutional rights.

The Court of Appeals found that Appellant was entitled to limited inspection of the juvenile transcript to determine the existence of any inconsistencies between the testimony at the adult trial and the previous trial testimony. Upon this limited reversal, the case was then remanded to the trial court to determine if such inconsistencies resulted in prejudice to Appellant. Appellant asserts that he was not only prejudiced by the trial court's refusal as recognized by the Court of Appeals, but also by and through the remedy granted by the Court of Appeals. The subsequent determination by the trial court that no substantial inconsistencies existed did little to alleviate the prejudice to the Appellant in not having the transcript prior to the cross-examination of the prosecuting witness. An ineffective cross-examination has been said to have been as lacking as no cross-examination at all. Appellant's rights guaranteed by the United States Constitution were not adequarely protected by the remedy of the Court of Appeals.

At every level of this appeal, Appellant has asserted that R.C. §2907.02(D) is both unconstitutional on its face and as applied in the case at bar. The trial court relied upon the statute to prohibit the introduction of certain proffered testimony which by today's standards was not inflammatory and was the most highly probative defense evidence in that it dealt with the main assertion of Appellant - the issue of consent and state of mind of the prosecuting witness. The Constitution guarantees the Appellant the opportunity to present a full and adequate defense to any charges brought against him. Yet this statute as promulgated by the State of Ohio denies him that right. The bald assertion that public policy demands such a statute is not applicable when the proffered testimony is of no inflammatory nature.

STATEMENT OF THE CASE

On or about February 23, 1978, the Greene County Grand Jury returned an indictment that Victor E. Goode violated Ohio Revised Code §2907.02(A)(1). Mr. Goode was arraigned before Judge Aultman on March 3, 1978, at which time a "not guilty" plea was entered.

Shortly after arraignment, counsel for the Defendant contacted Judge Hager of the Greene County Common Pleas Court, Division of Domestic Relations, Juvenile Branch, to arrange for the purchase of the trial transcript of a juvenile co-defendant who had been tried and convicted in the Greene County Juvenile Court prior to the date of Mr. Goode's arraignment. Judge Hager relying upon Ohio Juvenile Rule 37, denied the request of defense counsel. Shortly after that denial, defense counsel made an oral motion in the General Division of the Greene County Common Pleas Court requesting the trial judge in the Defendant's case to order that the Juvenile Branch provide the Defendant with the opportunity of purchasing this trial transcript which contained the testimony of the chief prosecuting witness, Karen Sherlock, and the examining medical witness, Dr. James Goldey. Judge Kimmel considered this oral motion on May 12, 1978.

At the same hearing, in camera arguments were made as to the applicability of O.R.C. §2907.02(D) to certain questions which defense counsel anticipated asking the complaining witness at trial.

At that hearing, Judge Edward Kimmel held that defense counsel would not be permitted to question the prosecuting witness concerning the fact that she was living with a male, Chris Roberts, for a significant period of time prior to the alleged rape on the basis of Ohio Revised Code §2907.02(D). In addition, the court overruled the Defendant's request for a transcript of the juvenile court trial testimony which request was specifically directed to the testimony of the complaining witness, Karen Sherlock, and/or the testimony of the examining

physician in the case, Dr. James Goldey, who were the sole witnesses against the juvenile co-defendant.

On June 8, 1978, a written Motion for Reconsideration of the previous ruling of the court concerning the transcript of the juvenile court proceedings was filed by counsel for Defendant and overruled by the court on the morning of the trial.

Prior to commencement of trial, an in camera discussion was held concerning the additional evidence about the prosecuting witness which was discovered between May 12, 1978 and June 12, 1978. A summary of that evidence is as follows: Defense counsel requested permission to cross-examine the prosecuting witness concerning these matters, which request was denied by the trial court.

Subsequent to a chambers,hearing voir dire examination was held, a jury was duly impaneled and a jury view was held without objection by either party and the trial commenced. The testimony continued for two days with final arguments being held on June 14, 1978. After arguments by counsel concerning the instructions, the court instructed the jury only on the charge of rape. After final arguments and the court's charge, the jury retired and returned the verdict of "guilty" to the criminal charge in the indictment. Defendant waived pre-sentence investigation and the court subsequently imposed a sentence of four to 25 years to run consecutively with any sentence previously imposed against Defendant.

An objection to the proposed Judgment Entry concerning the final order of the court was filed by defense counsel, which objection was overruled by the court. Defendant moved the court for an order to furnish the transcript of the juvenile court proceedings previously mentioned for the purposes of the appeal. The court ruled that the appeal contemplated by Juvenile Rule 37 was an appeal on behalf of the juvenile and not a co-defendant and therefore, overruled this Motion for a transcript. The court

approved the Judgment Entry entered on July 7, 1978, p.27, infra., and a timely Notice of Appeal, p. 5 , infra., was filed.

Eight Assignments of Error were raised in the Court of Appeals during the first appeal of this matter. After briefs were filed and oral arguments held, the Court of Appeals for Greene County, Second Appellate District, reversed the judgment of the trial court, holding that the principles of State v. White, 15 Ohio St. 2d 146 (1968) required the trial court to hold an in camera inspection of the previous trial testimony of the prosecuting witness to determine whether there were any inconsistencies between the two sets of testimony. The court further ordered that if the trial court, on remand, found that discrepancies existed which prohibited the Defendant from receiving a fair trial and denied him due process of law, the court should order a new trial.

Upon remand, the trial court, without giving the Defendant the opportunity to participate in an in camera hearing allegedly compared the transcript of the juvenile court case of the co-defendant, Richard Mayes, with the trial testimony in the case of the Defendant, Victor Goode. The court found the testimony to be identical as to the elements in the crime and the factual description of the evening. A Judgment Entry was filed on May 29, 1978, p. 14, infra., recording this finding.

Subsequent to the filing of this Judgment Entry, defense counsel requested a reconsideration of the court's order on the basis that the court had committed error by not providing defense counsel with an opportunity of participating in the in camera hearing which was mandated by the principles of the White, supra., case which had been relied upon by the Second District Court of Appeals. Accordingly, an in camera hearing was held on June 13, 1979 with defense counsel and the prosecution present. Subsequent to that hearing, briefs were filed concerning discrepancies between the two trial transcripts. Despite the

fact that the prosecution admitted that there was at least one discrepancy between the testimony of the chief prosecution witness at the trial of the juvenile defendant when compared to the testimony given in the adult Defendant's trial, the trial court ruled on July 23, 1979, p. 12, infra., that the objections of the Defendant were not well-taken and affirmed its previously entered Judgment Entry of May 29, 1979.

A timely Notice of Appeal was filed appealing from the Judgment Entry rendered on July 23, 1979. After briefs were filed and oral arguments held on the second appeal, the Court of Appeals for Greene County, Second Appellate District, reaffirmed its ruling on the original eight Assignments of Error raised by the Defendant and overruled the Ninth Assignment of Error which related to the trial court's ruling on remand.

A timely Notice of Appeal to the Supreme Court of Ohio was filed on May 15, 1980, p. 5, infra.. Memorandums in Support and Opposing Jurisdiction were filed by both sides after which, on September 12, 1980, that court dismissed the appeal, p. 3 , infra., stating that no substantial Constitutional question existed therein. It is upon that dismissal that we are before this Court today, for a determination of the Appellant's heretofore infringed upon Constitutional right to a fair trial.

THE QUESTION IS SUBSTANTIAL

The Constitutional right of a defendant in a criminal case to confront his accusers is embodied in the Sixth Amendment to the United States Constitution which was made applicable in its entirety to state proceedings through the due process clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.C. 1065 (1964).

In the instant case, the Appellant, well before trial, contacted the juvenile court judge to arrange for the preparation of the trial transcript of the juvenile co-defendant. Judge Hager denied that request. On May 12, 1978, an oral Motion

was made by counsel for Defendant requesting the trial court to permit the Defendant to obtain the transcript. The record below reflected that the co-defendant, Richard Mayes, was tried in February, 1978, and was convicted upon the testimony of the chief prosecuting witness, Karen Sherlock, and the examining physician, Dr. James Goldey. The juvenile co-defendant did not take the the stand.

On May 18, 1978, Judge Edward R. Kimmel reflected in his Judgment Entry that the juvenile court judge had previously denied the request for the transcript based upon the authority of Ohio Juv. R. 37(B). Judge Kimmel affirmed the position of the juvenile court and denied the Defendant the opportunity of obtaining the trial transcript testimony of the two chief prosecution witnesses who the defense anticipated would testify against the adult Defendant. In denying the Defendant the opportunity of obtaining a copy of the transcript of the juvenile court testimony, the court relied on Juv. R. 37(B), which provides:

> No public use shall be made by any person, including a party, of any juvenile court record, including the recording or transcript thereof, of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court.

It is apparent from the test of Juv. R. 37(B) that the trial court had discretion to permit the Defendant to obtain the transcript. The obvious policy reason behind Ohio Juv. R. 37(B) is to protect the privacy of the juvenile. Here, however, the juvenile in question did not testify. In fact, the testimony in question was that of the prosecuting witnesses. Further, the appeal time had run with respect to the juvenile case. The result of the trial court's ruling was to protect the privacy of the prosecution witnesses with a resultant restriction of the Defendant's right to properly prepare for trial. There can be no doubt that this transcript was the key to preparing for cross-examination of the prosecuting witnesses. The Ohio Supreme Court, in the case of State v. Cox, 42 Ohio St. 2d 200, 327 N.E. 2d 639 (1975) weighed the state interest of protecting the con-

fidentiality of juvenile records against the interest of a defendant preparing for trial. Although the facts were somewhat different, the basic principles involved are the same. The court held at p. 672:

> Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.

In Cox, supra., the trial court excluded certain testimony which would have established the prior juvenile record of a prosecuting witness. That court held that such exclusion constituted prejudicial error and the decision of the Court of Appeals was reversed and the case remanded to the trial level for a new trial.

This Court had decided a similar question in the case of Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347 (1974). In that case, this Court considered whether an Alaska statute could prohibit cross-examination of a prosecution witness concerning his possible bias where his prior adjudication as a juvenile delinquent would have been established. In balancing the competing interests involved, Justice Berger stated at p. 320, 415 U.S. 308:

> The state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require the yielding of so vital a Constitutional right as the effective cross-examination for bias of an adverse witness. Id.

This Court also held on p. 319 that:

> In this setting, we conclude that the right of confrontation is paramount to the state's policy of protecting the juvenile offender. Whatever temporary embarrassment might result to Greene or his family by disclosure of his juvenile record -- if the prosecution insisted on using him to make its case -- is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness. Id.

Thus, the Supreme Court of the United States and the Supreme Court of Ohio have both decided that statutes similar to Ohio Juv. R. 37(B) do not limit the Constitutional right of the De-

fendant to a full and effective cross-examination of an adverse witness.

The Court of Appeals in its first decision acknowledged that the Defendant's Constitutional right of confrontation outweighed the interest protected by the trial court's ruling prohibiting the Defendant from obtaining a copy of the juvenile court trial transcript. These Constitutional rights, though acknowledged, remained unprotected by the remedy imposed by the Court of Appeals.

The Court of Appeals, through its limited reversal, remanded the case to the Common Pleas Court for the sole purpose of permitting the court to follow the procedures outlined in the case of State v. White, 15 Ohio St. 2d 146 (1968). In White, the Ohio Supreme Court held that a trial court was required to determine in an in camera hearing whether inconsistencies existed between the statements of a witness and the testimony that that witness gave at trial. The court went on to rule that if the trial court found that discrepancies existed which prohibited a Defendant from receiving a fair trial and denied him due process of law, the trial court should order a new trial. Despite the fact that there is a significant difference between a written statement given to police authorities, as was involved in the White case, and prior trial testimony of prosecution witnesses given under oath against a co-defendant, the Court of Appeals for the Second Appellate District concluded that the remedy outlined in State v. White, supra., adequately protected the Defendant's right of confrontation. Appellant believes that this remedy is inadequate.

The function of a jury is to determine the credibility of each and every witness. Without the use of the transcript prior to cross-examination, the jury is denied the opportunity to rate the credibility of the prosecution witness in light of an effective cross-examination made through the use of said transcript. An ineffective cross-examination is no better than

no cross-examination at all. Appellant "needed" said transcript to present his defense fully. In Britt v. North Carolina, 404 U.S. 226, 92 S.C. 431, (1971), this Court stated two factors relevant to the determination of "need" as follows:

> (1) ...the value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as the transcript.

This Court further said at p. 228:

> Even in the absence of specific allegations, the value of a transcript of that record to the defense can ordinarily be assumed. Id.

In the instant case there has been absolutely no showing on the part of the prosecution that any alternative device would fulfill the same function as the trial transcript. In point of fact, there is no alternative device which could come close to providing the defense with as effective a tool for preparation as the trial transcript against a co-defendant. The prejudice to the Defendant-Appellant is heightened by the fact that the remedy elected by the Court of Appeals of Greene County permitted the trial court to make the determination of what would be useful to the defense. This Court has previously found that the trial court should not usurp the duty of trial counsel to determine what would and would not be effective in the defense of a criminal defendant.

In Dennis v. United States, 384 U.S. 855, 86 S.C. 1840, (1966) 16 L. Ed. 2d 973, this Court held:

> The determination of what may be useful to the defense can effectively be made only by counsel. The trial court judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process.

In the U.S. Report at 875, the Court stated:

> In our adversary system, it is enough for the judges to judge. The determination of what may be useful to the defense can properly be made only by an advocate.

The decision by the Court of Appeals clearly was contra to the ruling in Dennis in that it took away from counsel, who most

probably had the most thorough understanding of all aspects of the case, the task of determining what was and what was not important to the defense of the accused.

The initial decision in White was rendered in 1968. Subsequent to the pronouncement of the Ohio Supreme Court in White, the Ohio Rules of Criminal Procedure took effect on July 1, 1973. Appellant here asserts that the principles announced in White have been expanded nor contracted by Ohio Criminal Rule 16(B)(1)(g). Where a Defendant in a criminal case has been denied an in camera inspection to determine whether there are inconsistencies in the testimony given by the chief prosecuting witness in different trials of co-defendants, the trial court must no longer find that the discrepancies which existed prohibited the Defendant from receiving a fair trial and denied him due process of law. Subsequent to the promulgation of Ohio Crim. R. 16(B)(1)(g), if the trial court finds that any inconsistency existed between the two sets of testimony, the defendant is entitled to make full use of the witness statement.

Ohio Crim. R. 16(B)(1)(g) provides:

> Upon completion of a witness' direct examination at trial, the court, on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

It is clear that Crim. R. 16(B)(1)(g) expanded and clarified the pronouncements of State v. White, supra.. This proposition was discussed in the case of State v. Ellis, 46 Ohio App. 2d 102 (1975) in which case the Court of Appeals for Cuyahoga County held at ps. 104-105:

> Crim. R. 16(B)(1)(g) is certainly no contraction of the principles of the White case. At very least, it expands and clarifies that case. Moreover, the Criminal Rules are designed to 'provide for the just determination of every

criminal proceeding'. Crim. R. 1(B).

The rule says nothing as to the degree of inconsistency necessary. It is for that reason that Appellant asserts that upon the finding of any inconsistency, as delineated in the Criminal Rule, subsequent to the denial of the use of such previous testimony at the time of the initial cross-examination, the court should have ordered a new trial and provided the previous transcript for the use of the defense to assist in the trial preparation.

The other error asserted by Appellant is in regard to the constitutionality of Ohio's Rape Shield Statute, O.R.C. §2907.02(D). Appellant asserts that exclusion of testimony which is relevant to a prosecuting witness' state of mind on the evening of an alleged crime, which is not evidence of 'specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, or reputation evidence of the victim's sexual activity', but which may be indirectly related to sexual activity of the prosecuting witness due to R.C. §2907.02(D), makes the statute unconstitutional. Prior to trial, counsel for Defendant informed the trial court and the prosecutor of his intention to introduce evidence concerning the following two matters: (1) the fact that the prosecuting witness, Karen Sherlock, had been living with one Chris Roberts for an extended period of time. Mr. Roberts was the man whom the prosecuting witness was going to see when she left Columbus, Ohio, hitchhiking at 4:30 a.m. "because I just had to see him"; (2) in June, 1977, Karen Sherlock had an aborted pregnancy. The aborted child was Mr. Roberts'. The original proffer of evidence was made at a hearing held on May 12, 1978, in the chambers of Judge Kimmel. A Judgment Entry was filed in Greene County Common Pleas Court on May 18, 1978, which established guidelines under §2907.02(D), which prohibited defense counsel from questioning the complaining witness concerning this live-in relationship of the prosecuting witness with Chris Roberts. See ps. 32-34, infra.

This particular evidence was extremely important in ex-

plaining the great degree of emotional distress and anger she felt with her boyfriend, Chris Roberts, who, unbeknownst to Karen Sherlock, had been seeing another woman while living with her. The defense contended from the outset that the sexual conduct was consensual and not as a result of force nor threat of force.

The sole argument of the prosecutor against the admission of evidence was that such admission was barred by the shield of R.C. §2907.02(D) which provides:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease or the victim's past sexual activity with the offender and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Sober reflection upon the introductory language of R.C. §2907.02 leaves no doubt that the statute was not designed to exclude evidence such as the live-in relationship of this particular prosecuting witness or of an abortion. Such evidence is not: (1) evidence of specific instances of the victim's sexual activity; or (2) opinion evidence of the victim's sexual activity; or (3) reputation evidence of the victim's sexual activity. Rather, this evidence directly reflects upon the state of mind of the prosecuting witness on the night in question. The entire prosecution's case hinged on the stability of Karen Sherlock. The excluded testimony would have established the fact that she had every reason to be irrational on that night.

The Ohio Supreme Court has held in the case of State v. Gardner, 59 Ohio St. 2d 14 (1979) that a balancing test must be employed to determine whether the state interest served by R.C. §2907.02(D) outweighs the probative value of excluded evidence. It is Appellant's position, however, that the application of the balancing test does not protect a defendant in a criminal case. What occurred below and will continue to occur

in Ohio trial courts unless this Court accepts jurisdiction of this case and explicitly provides guidelines as to the constitutionality of R.C. §2907.02(D), is that the prosecution in rape cases will use the shield statute to limit the cross-examination of prosecuting witnesses to matters which even indirectly relate to sexual activities. The tragedy of this application is readily apparent when considering the excluded testimony in the instant case. Here is a young woman who leaves Columbus, Ohio, at 4:30 a.m., hitchhiking to see her ex-boyfriend because she has to see him as soon as possible. Such actions are not rational. The jury, however, was not permitted to hear the evidence which would have explained the depth of the irrationality on the part of the prosecuting witness. Rather, the shield statute permitted the jury to speculate that this was just some college girl who was walked back to the dormitory by her boyfriend every night. The prosecution, the defense, the court and the prosecuting witness knew differently. However, this critical testimony which should have been weighed by the triers of fact was excluded from their consideration by an overextension of the protections granted to the prosecuting witness under R.C. §2907.02 (D).

In Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d §307 (1974), this Court was confronted with a conflict between a state statute designed to protect the identity of juvenile offenders and the Constitutional right to confrontation of witnesses through cross-examination:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.... A more particular attack on the witness' credibility is effected by means of cross-examination directed towards revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony'. 3A, J. Wigmore, Evidence, §940, p. 775 (Chadbourn Rev., 1970).
>
> We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

In light of the recognized importance of cross-examination and the fact that the proffered evidence related directly to the state of mind of the victim and only indirectly to any previous sexual activities, the court erred in not allowing the proffered evidence. Should the Court decide that the balancing test as express in Gardner, supra., is applicable to the case at bar, the evidence should still have been admitted. This proffered evidence concerning the live-in relationship of the prosecuting witness as well as the evidence concerning her previous abortion was clearly probative of the state of mind of the prosecuting witness on the night of this occurrence and her susceptibility towards actions that might be viewed as penalizing her estranged lover. The public acceptance of legalized abortion as well as the increased number of cohabitants outside matrimony does not make this evidence unduly inflammatory or prejudicial. Further this evidence does not concern any specific sexual acts, as the evidence did not attempt to identify any particular date in which sexual relations occurred. The defense proffered the evidence to show the depth of the involvement of the prosecuting witness with her boyfriend in an attempt to expose her volatile emotional state after she learned that her boyfriend had become involved with another woman. This evidence directly relates to the theory of consent raised by the Appellant.

How is the Appellant to assert adequately his defense of consent if he is barred from amplifying the extent of the prosecuting witness' irrational conduct? Under today's norms, a person is no longer chastzied for conduct similar to that of the prosecuting witness prior to the night in question. When a person's actions are difficult to explain, such difficulty is greatly heightened when the defendant is prohibited from presenting any background information to the jury. Ohio's Rape Shield Statute, both on its face and as applied, is an unconstitutional denial of Appellant's right of confrontation as guaranteed by the Sixth Amendment.

CONCLUSION

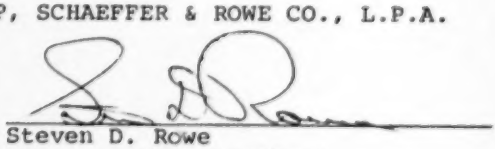
The defendant in a criminal case must be given all available tools to present a full and adequate defense. When a critical tool for proper cross-examination is denied defendant an after-the-fact determination of the value of said tool does little, if anything, to rectify the error. The Appellant herein should be granted a new trial at which time he should have at his disposal the use of said critical tool prior to cross-examination.

Ohio's Rape Shield Statute, R.C. §2907.02(D), is unconstitutional on its face in that it prohibits the introduction of highly relevant evidence which is crucial to the defendant's case. The exclusion of such evidence is directly contrary to the Sixth Amendment to the Constitution.

It is for the aforementioned reasons that the Appellant strongly urges this Court to accept jurisdiction of this appeal.

Respectfully submitted,

KEMP, SCHAEFFER & ROWE CO., L.P.A.

By: 

Steven D. Rowe
Attorney for Appellant
Victor E. Goode
45 North Wilson Road
Columbus, OH 43204
(614) 276-2678

IN THE
SUPREME COURT OF THE UNITED STATES
December Term, 1980

NO.

VICTOR E. GOODE, APPELLANT

vs

STATE OF OHIO, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF OHIO

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellant's Jurisdictional Statement, filed with the United States Supreme Court on this 11th day of December, 1980, was deposited in the U.S. Mail, postage prepaid, to opposing counsel, Michael DeWine, Greene County Prosecutor, Courthouse, Xenia, OH 45385, on this 10th day of December, 1980.

KEMP, SCHAEFFER & ROWE CO., L.P.A.

By:

Steven D. Rowe
Counsel for Appellant
Victor E. Goode
45 North Wilson Road
Columbus, OH 43204
(614) 276-2678

RECEIVED
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
December Term, 1980

NO. 80-5920

VICTOR E. GOODE, APPELLANT

vs

STATE OF OHIO, APPELLEE

APPENDIX TO JURISDICTION STATEMENT

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IN THE SUPREME COURT OF THE STATE OF OHIO

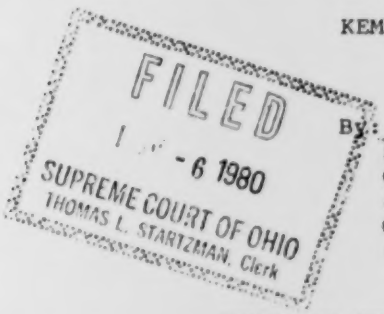
VICTOR E. GOODE,	:	
Appellant	:	
-vs-	:	CASE NO. 80-845
STATE OF OHIO,	:	
Appellee.	:	

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Notice is hereby given that Victor E. Goode, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, dismissing the appeal, entered herein on September 12, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

KEMP, SCHAEFFER & ROWE CO., L.P.A.



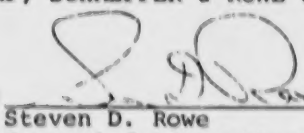
By: _____
Steven D. Rowe
Counsel for Appellant
45 North Wilson Road
Columbus, OH 43204
(614) 276-2678

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the within Notice of Appeal to the Supreme Court of the United States was directed to Michael DeWine, Greene County Prosecutor, Counsel for Appellee, Courthouse, Xenia, Ohio 45385, by depositing same in the U.S. Mail, postage prepaid, on this 4 day of

November, 1980.

KEMP, SCHAEFFER & ROWE CO., L.P.A.

By: 

Steven D. Rowe
Counsel for Appellant

SC-103 79-10-1 BARRETT BROTHERS PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 80 *TERM*

To wit: SEP 12 1980

State of Ohio,
Appellee,

vs.

Victor E. Goode,
Appellant.

No. 80-845

APPEAL FROM THE COURT OF APPEALS

for GREENE *County*

This cause, here on appeal as of right from the Court of Appeals for GREENE *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for GREENE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SC78 BARRETT BROTHERS, PRINTERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 80 *TERM*

To wit: SEP 12 1980

State of Ohio,
Appellee,
vs.
Victor E. Goode,
Appellant.

80-845
No.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for GREENE *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Kemp, Schaeffer and Rowe

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .....*day of* ..... *19*.....

.....*Clerk*

.....*Deputy*

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO
SECOND APPELLATE DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VICTOR E. GOODE

DEFENDANT-APPELLANT

GREENE COUNTY OF OHIO
FILED
CASE NO. CA 1107
MAY 15 1980
COURT OF APPEALS
CLERK OF COURTS

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Victor E. Goode, Defendant-Appellant, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Greene County, Ohio, Second Appellate District, entered in the journal on April 24, 1980, affirming the judgment of the Court of Common Pleas, Greene County, Ohio for the Plaintiff-Appellee, State of Ohio.

This case involves substantial Constitutional issues and is a case of public and great general interest.

Respectfully submitted

KEMP, SCHAEFFER & ROWE CO., L.P.A.

Steven D. Rowe

Steven D. Rowe
Attorney for Defendant-Appellant
45 North Wilson Road
Columbus, Ohio 43204
Telephone: 614-276-2678

Michael DeWine
Greene County Prosecutor
Attorney for Plaintiff-Appellee
Greene County Court House
Xenia, Ohio 45385
Telephone: 513-372-4461

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice Appeal to the Supreme Court of Ohio has been mailed, first class, postage prepaid to Plaintiff-Appellee, through its counsel, Michael DeWine, Greene County Prosecutor, Greene County Courthouse, Xenia, OH 45285 this 13th day of May, 1980.

KEMP, SCHAEFFER & ROWE CO., L.P.A.

By: Steven D Rowe
Steven D. Rowe
Attorney for Defendant-Appellant
45 North Wilson Road
Columbus, OH 43204
(614) 276-2678

MAY 2 5 1980

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	
vs.	:	Case No. CA 1107
VICTOR E. GOODE	:	JOURNAL ENTRY
Defendant-Appellant	:	

Pursuant to the decision rendered by this court on April 15, 1980, the judgment of the Court of Common Pleas of Greene County is hereby affirmed.

Judge McBride

Judge Kerns

Judge Phillips

Dated: April 24, 1980

Copies mailed to:

Michael DeWine, Prosecuting Attorney

Steven D. Rowe, Attorney at Law

APR 15 1980

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : Case No. CA 1107

VICTOR E. GOODE :

Defendant-Appellant :

.....

OPINION

Rendered on the 15th day of April, 1980.

.....

Michael DeWine, Prosecuting Attorney, Court House, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

Steven D. Rowe, Attorney at Law, 45 North Wilson Road, Columbus, Ohio 43204
Attorney for Defendant-Appellant

.....

BY THE COURT:

This case appears in this court a second time. During its initial appearance, and while considering numerous assignments of error, this court commented upon one of the alleged errors as follows:

> "The second assignment of error alludes to the action of the trial court in overruling a motion of the defendant for a transcript of the testimony taken in the Juvenile Court in the case of a co-defendant, Richard Mayes.
>
> As argued by the State, Juvenile Rule 37(B) restricts the use which may be made of a transcript of any juvenile court hearing. However, in State v. Cox, 42 Ohio St. 2d 200, the Ohio Supreme Court had occasion to consider that restriction when it came in conflict with the rights of an adult defendant

preparing for trial. Although the facts in the Cox case are somewhat different from those of the present case, the basic principles involved appear to be the same.

In that case, the court considered Section 2151.368, Revised Code, which is a similar import as Juvenile Rule 37(B), and said:

> 'Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactments may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense.'

In the Cox case, the Supreme Court of Ohio relied to some extent upon Davis v. Alaska, 415 U.S. 308, where the Supreme Court of the United States made the following observation:

> 'The state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.'

In the present case, the complaining witness was the only person present at the time of the offense other than the two defendants, and she had testified against the juvenile defendant, Hayes, at his trial in Juvenile Court. The defense requested a transcript of her testimony, but the request was overruled on May 18, 1978. Subsequently, on June 8, 1978, a motion for a reconsideration of the initial request was likewise overruled.

In our opinion, this case is subject to the principles discussed in State v. White, 15 Ohio St. 2d 146, where the court said:

> '5. Where in a criminal case, a trial court has refused an in camera inspection to determine whether there are inconsistencies in the statements of a witness, a judgment of conviction should be reversed and the cause remanded for an inspection and hearing on the evidence contained in such statements. If the trial court, on remand, finds

> that such discrepancies existed and prohibited defendant from receiving a fair trial and denied him due process of law, it should order a new trial.'
>
> Accordingly, a final disposition of this alleged error must await a remand to the Court of Common Pleas for the purpose of determining whether a denial of the right to inspect the juvenile proceedings resulted in actual prejudice to the rights of the appellant or otherwise prevented him from receiving a fair trial."

After reviewing and overruling the other assignments of error, the court at that time proceeded further as follows:

> "At this juncture, the record in the present case does not portray prejudicial error, but in accordance with the procedural recommendations of State v. White, 15 Ohio St. 2d 146:159; State v. White, 27 Ohio St. 2d 73, the judgment will be reversed, with the limitations expressed in White, and the case remanded to the Court of Common Pleas for further proceedings in accordance with the instructions included in this opinion under the second assignment of error for the production, inspection and hearing on the testimony of the witness in the Juvenile Court. If the trial court on remand finds that discrepancies existed and that such discrepancies prohibited defendant from receiving a fair trial and denied him due process of law, it should order a new trial. On the contrary, if on remand the trial court finds that discrepancies do not exist or, if they exist, that the discrepancies did not prohibit defendant from receiving a fair trial, it should affirm the verdict and deny a new trial. In event of the latter, a new appeal may be filed on that judgment."

Subsequently, upon remand, the Common Pleas Court determined that the previous testimony of the witness in Juvenile Court was devoid of any inconsistency or variation which could have prevented the defendant from receiving a fair trial and due process of law, and in accordance with this finding, the trial court denied Goode a new trial.

Upon examination of the record, the second assignment

of error, which was held in abeyance pending compliance with the procedural recommendations of the White case, is overruled, and all of the other alleged errors having been considered and overruled in our decision of April 24, 1979, the judgment of the Court of Common Pleas of Greene County will be affirmed.

McBRIDE, P. J., KERNS and PHILLIPS, JJ. concur.

.....

FILED

JUL 22 P 3:31

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO

Plaintiff, : CASE NO. 77 CR 186

-vs- :

VICTOR E. GOODE JUDGMENT ENTRY

Defendant. :

- - -

The Court, on May 29, 1979, reviewed the two transcripts in question and put on an Entry to the effect that the Court, after its examination finds the testimony in both transcripts identical as to the elements of the crime and the factual description of the evening.

After objections of Defendant's attorney, an additional hearing was held on this matter, wherein the transcript of the Juvenile case was furnished to the attorney for the Defendant and State of Ohio, with an opportunity to submit their memorandum and objections, which they have done, on July 3, 1979 for the Defendant and July 17, 1979 for the Prosecution.

The Court does not find the objections of the Defendant well taken and OVERRULES same and hereby AFFIRMS its own Judgment Entry of May 29, 1979.

JUDGE EDWARD R. KIMMEL

FILED

79 JUN 14 A 9:22

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

CLERK
COURT
GREENE COUNTY

STATE OF OHIO

Plaintiff, : CASE NO. 77 CR 186

-vs- :

VICTOR GOODE : JUDGMENT ENTRY

Defendant. :

- - -

An In Camera hearing was held on June 13, 1979 on Defendant's motion requesting the Court to reconsider its Judgment entered on May 29, 1979.

Present were Michael Dewine on behalf of the State of Ohio and Steven Rowe on behalf of the Defendant.

Oral arguments were presented by both the State of Ohio and Defense Counsel.

The Defendant is granted ten (10) days to file a brief in support of this motion, and the Prosecutor is granted ten (10) days from filing of said brief in which to file a responsive brief.

JUDGE EDWARD B. KIMMEL

FILED

MAY 29 A10: 08 03

CLERK

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO

Plaintiff, : CASE NO. 77 CR 186

-vs- : CA NO. 1025

VICTOR GOODE : JUDGMENT ENTRY

Defendant. :

- - -

The Court, pursuant to the Judgment of the Court of Appeals has compared the transcript in the Juvenile Court Case of the co-Defendant, Richard Mayes, wherein the co-Defendant, Richard Mayes, was on trial and the case which is the subject matter of this litigation, wherein the complaining witness in the rape case was identical.

The Court, after its examination finds the testimony in both transcripts identical as to the elements of the crime and the factual description of the evening.

The Court shall attach to the Clerk of the Court of Appeals the two transcripts in question in a sealed envelope, marked Court's Exhibit "1".

JUDGE EDWARD R. KIMMEL

IN THE COURT OF APPEAL' OF GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : Case No. CA 1025

VICTOR E. GOODE : JOURNAL ENTRY

Defendant-Appellant :

.....

Pursuant to the decision rendered by this court on April 24, 1979, the judgment is hereby reversed and the case remanded to the Court of Common Pleas of Greene County for further proceedings according to the instructions included in the decision under the second assignment of error for the production, inspection and hearing of the testimony of the witness in the Juvenile Court.

Dated: May 14, 1979

Copies mailed to:

Michael DeWine, Prosecuting Attorney

Steven D. Rowe, Attorney at Law

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : Case No. CA 1025

VICTOR E. GOODE :

Defendant-Appellant :

.....

OPINION

Rendered on the 24th day of April, 1979.

.....

Michael DeWine, Prosecuting Attorney, Greene County, Greene County Court House, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

Steven D. Rowe, Attorney at Law, 45 North Wilson Road, Columbus, Ohio 43204
Attorney for Defendant-Appellant

.....

BY THE COURT:

The defendant, Victor E. Goode, was tried by jury in the Court of Common Pleas of Greene County and found guilty of rape in violation of Section 2907.02(A)(1), Revised Code, and from the judgment and sentence thereupon entered in the trial court, Goode has appealed to this court.

The first assignment of error challenges the overruling of a motion of the defendant for a change of venue. The motion was filed on March 2, 1978 and overruled on March 7, 1978.

The motion for a change of venue was accompanied by six short articles from local newspapers about the rape, three of which referred to the arrest and indictment of the appellant

for the crime. Another of the articles reported that a juvenile co-defendant had been processed and committed by the Juvenile Court for the crime.

Prior to the voir dire examination of the jury, the appellant brought the matter up again, after which the court asked the entire panel if anyone had read the articles. One prospective juror said that she might have read about it, but indicated that she remembered nothing about the incident. The appellant later used a peremptory challenge to remove her. This was the only prospective juror who responded to the general question of the court, but later, a Mr. Stalter indicated to the prosecuting attorney that he read the paper from cover to cover, but did not recall this case. The appellant did not question this juror and did not remove him, but the defense did otherwise exhaust all peremptory challenges.

According to Rule 18(B) of the Rules of Criminal Procedure, a change of venue may be granted "when it appears that a fair and impartial trial cannot be had", but here, the facts disclose that the articles in the newspaper were small, few in number, and had appeared long before the trial. Furthermore, none of the jurors remembered reading about the case, and the record is devoid of any showing that the trial court abused its discretion in overruling the motion for a change of venue. See, State v. Fairbanks, 32 Ohio St. 2d 39. The first assignment of error is overruled.

The second assignment of error alludes to the action

of the trial court in overruling a motion of the defendant for a transcript of the testimony taken in the Juvenile Court in the case of a co-defendant, Richard Mayes.

As argued by the State, Juvenile Rule 37(B) restricts the use which may be made of a transcript of any juvenile court hearing. However, in State v. Cox, 42 Ohio St. 2d 200, the Ohio Supreme Court had occasion to consider that restriction when it came in conflict with the rights of an adult defendant preparing for trial. Although the facts in the Cox case are somewhat different from those of the present case, the basic principles involved appear to be the same.

In that case, the court considered Section 2151.358, Revised Code, which is of similar import as Juvenile Rule 37(B), and said:

> "Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactments may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense."

In the Cox case, the Supreme Court of Ohio relied to some extent upon Davis v. Alaska, 415 U.S. 308, where the Supreme Court of the United States made the following observation:

> "The state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."

In the present case, the complaining witness was the only person present at the time of the offense other than the two defendants, and she had testified against the juvenile defendant,

Mayes, at his trial in Juvenile Court. The defense requested a transcript of her testimony, but the request was overruled on May 18, 1978. Subsequently, on June 8, 1978, a motion for a reconsideration of the initial request was likewise overruled.

In our opinion, this case is subject to the principles discussed in State v. White, 15 Ohio St. 2d 146, where the court said:

> "5. Where in a criminal case, a trial court has refused an in camera inspection to determine whether there are inconsistencies in the statements of a witness, a judgment of conviction should be reversed and the cause remanded for an inspection and hearing on the evidence contained in such statements. If the trial court, on remand, finds that such discrepancies existed and prohibited defendant from receiving a fair trial and denied him due process of law, it should order a new trial."

Accordingly, a final disposition of this alleged error must await a remand to the Court of Common Pleas for the purpose of determining whether a denial of the right to inspect the juvenile proceedings resulted in actual prejudice to the rights of the appellant or otherwise prevented him from receiving a fair trial.

The third assignment of error is stated as follows:

> "The trial court committed prejudicial error in overruling the motion of defendant for a mistrial after Detective Sgt. Wager testified concerning the status of the defendant as a parolee."

During the direct examination of the police detective who went to Columbus to arrest the appellant after he had obtained a warrant for his arrest as a result of his investigation of the complaint, the following occurred:

"Q. Okay. After receiving the arrest warrant and the complaint, what did you do?

A. I went to Columbus.

Q. Okay. Did you go alone or did you have another officer with you.

A. I took another officer with me, Detective Siler.

Q. And can you tell us what you did next, Detective, in regard to this investigation?

A. We made contact with the Columbus Police Department in an effort to obtain a current address of Victor Goode and Richard Mayes. I made contact, I finally found out Victor Goode's address by talking to his parole officer, Mr. Garner and he advised us of his new address.

MR. ROWE: Objection, Your Honor. May we approach the bench?"

In chambers, the appellant moved for a mistrial. This was refused and the court immediately instructed the jury, as requested by the appellant, as follows:

"Ladies and gentlemen of the jury, the court at this time instructs you to totally disregard the last statement of this witness and consider it for no purpose. You may proceed."

It has been held that when improper evidence has been erroneously admitted, the trial court's admonition to the jury to disregard it cures the error unless the objectionable matter is excessively inflammatory. State v. Davis, 44 Ohio App. 2d 335.

It has also been held that where the court sustained an objection to the evidence and promptly instructed the jury to disregard it, the action of the court in refusing to order a mistrial is not error unless it is patent that the jury disregarded the instructions. State v. Holt, 17 Ohio St. 2d 81. See also, State v. Andlauer, 71 Ohio Law Abs. 449; State v. Ross,

70 Ohio Law Abs. 525; 4 Ohio Jurisprudence 2d 139, Section 905.

Here, the improper evidence apparently came before the jury inadvertently, and upon a review of the entire record, we cannot say that the reference to the "parole officer" denied the appellant a fair trial. Ordinarily, a mistrial should not be ordered and the jury discharged in a criminal case unless the substantial rights of the accused are prejudiced thereby. 15A Ohio Jurisprudence 2d 438, Section 371. The alleged error is overruled.

The fourth assignment of error is dependent upon facts which gave rise to the fifth and sixth assignments of error, and for this reason, it will be considered out of order.

The fifth and sixth assignments of error are as follows:

"5. The trial court committed prejudicial error in applying R.C. 2907.02(D) to certain proffered testimony concerning the prosecuting witness Karen Sherlock.

6. The trial court committed prejudicial error in sustaining the constitutionality of R.C. 2907.02(D) in that the statute is unconstitutional on its face and as applied to the circumstances of this case."

Prior to the commencement of the trial, the appellant proffered certain evidence, the admissibility of which was denied by the trial court. The evidence proffered and refused was that the complaining witness had been living with a man and had been having sexual intercourse with him five or six times a week, the last time on December 7, 1977, which was only twelve days prior to the rape. Other evidence sought to be introduced was that the complaining witness had had an abortion in June, 1977. The

appellant proposed to introduce the evidence through a statement the complainant had made to a detective wherein she admitted these alleged facts.

The trial court ruled that such evidence was subject to the prohibitions of Section 2907.02(D), Revised Code, which reads as follows:

> "Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender."

A reasonable interpretation of the wording of the statute shows its intendment and supports the conclusion of the trial court. Hence, the fifth assignment of error is overruled.

With reference to the additional claim that the statute is unconstitutional, this court has already rejected the due process and equal protection arguments in the cases of State v. Moody, Montgomery County Court of Appeals, No. 5270 (May 20, 1977) and State v. Johnson, Greene County Court of Appeals, No. 940 (December 15, 1977). The sixth assignment of error is likewise overruled.

Reverting to the fourth assignment of error, the appellant alleges as follows:

> "The trial court committed prejudicial error in restricting cross-examination of the prosecution's medical expert."

During the cross-examination of the physician who examined the victim after the rape, the following exchange took place:

"Q. Now, did you examine the hymen of Karen Sherlock?

A. I did a pelvic examination. That would be part of it.

MR. SCHENCK: Objection to any further questioning.

MR. DEWINE: May we approach the bench, Your Honor?

(Whereupon, a brief discussion was held at the bench off the record.)

THE COURT: The court will stand in recess. The jury is excused. Remember the admonition of the court."

In chambers, the appellant indicated that he wished to examine in this area in order to ascertain whether there was any tissue damage to the hymen which ordinarily accompanies forcible rape. The court, rightfully fearful that the use of the word hymen would lead to answers implying past sexual activity, refused to allow the use of this word but did permit questions of tissue damage to the genitals generally:

"Q. Doctor, with respect to your examination of the genitalia, is that the right pronounciation?

A. Yes.

Q. Of Karen Sherlock, did you see any swelling?

A. No.

Q. Did you see any lacerations?

A. No.

Q. Did you see any bruising?

A. No.

Q. Did you see any traumatic type of bleeding?

A. No.

Q. Did you see anything which indicated that any particular area has any trauma over and above ordinary sexual intercourse to it?

A. No."

The extent of cross-examination rests within the discretion of the trial court, and the record shows that the only purpose for introducing the word "hymen" was to get into evidence obliquely what could not be introduced directly because of the statutory prohibition. In our opinion, therefore, the trial court properly excluded this evidence of prior sexual activity. See, State v. Moody, supra.

Under the fourth assignment of error, the appellant also complains as to the court's ruling in refusing to allow counsel to read a passage from a book to the doctor which, from the proffer made, seemed to contradict an opinion of the doctor as to the longevity of sperm in the vagina, but the court's ruling was correct for two reasons. In the first place, proper foundation for impeachment was not laid since the authoritative status of the treatise sought to be read from was not established, and secondly, the method of impeachment was improper since the doctor had not relied on the work or admitted its standing as an authority. See, 60 A.L.R. 2d 77; 31 American Jurisprudence 2d 575, Sections 67 & 68; Bluebird Baking Co. V. McCarthy, 36 N.E. 2d 801. The fourth assignment of error is overruled.

The seventh assignment of error is based upon the failure of the trial court to sustain the defendant's motion to acquit, but the record discloses sufficient evidence upon every

element of the crime to warrant the submission of the case to the jury. Furthermore, the appellant did not testify or present any witnesses so as to raise any question as to the weight of the evidence. The alleged error is without merit.

The eighth assignment of error is based upon the court's reference to Section 2929.41(B)(3), Revised Code, in declaring that the sentence imposed in this case would run consecutively to any imposed as a result of the appellant's being a parole violator. Specifically, the appellant asserts that the statute is unconstitutional in that it requires cruel and unusual punishment. This alleged error is without merit and will be overruled. See, State, ex rel, Drexel v. Alvis, 66 Ohio Law Abs. 574.

At this juncture, the record in the present case does not portray prejudicial error, but in accordance with the procedural recommendations of State v. White, 15 Ohio St. 2d 146:159; State v. White, 27 Ohio St. 2d 73, the judgment will be reversed, with the limitations expressed in White, and the case remanded to the Court of Common Pleas for further proceedings in accordance with the instructions included in this opinion under the second assignment of error for the production, inspection and hearing on the testimony of the witness in the Juvenile Court. If the trial court on remand finds that discrepancies existed and that such discrepancies prohibited defendant from receiving a fair trial and denied him due process of law, it should order a new trial. On the contrary, if on remand the trial court finds that discrepancies do not exist or, if they exist, that the discrepancies

did not prohibit defendant from receiving a fair trial, it should affirm the verdict and deny a new trial. In event of the latter, a new appeal may be filed on that judgment.

The production, inspection and hearing on remand shall be held within sixty days after the filing of the final entry in this court, and the issue finally decided by the trial court within thirty days thereafter.

McBRIDE, P. J., KERNS and PHILLIPS, JJ. concur.

.....

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO

Plaintiff, : CASE NO. 77 CR 186

-vs- :

VICTOR GOODE : JUDGMENT ENTRY

Defendant. :

- - -

This matter came on to be heard on the Defendant's objection to proposed Judgment Entry and for reconsideration of prior ruling of this Court.

The first point defense counsel addressed himself to was the sentence being a consecutive sentence.

The Court finds Section 2929.41 (B)(3) mandatory. The Defendant is a Parolee and the Court has no option but to make a consecutive sentence.

The Defendant further moved the Court for an Order to furnish the transcript of the Juvenile Court for purposes of Appeal. In reading Juvenile Court Rule 37, which reads as follows:

> "Restrictions on use of recording or transcript. No public use shall be made by any person, including a party, of any juvenile court record, including the recording or a transcript thereof of any juvenile court hearing, except in the court of an appeal or as authorized by order of the court."

This Court feels the Appeal referred to in subsection (B) contemplates an Appeal on behalf of the Juvenile and not of a Co-Defendant, as in the instant case.

The motion for transcript is therefore OVERRULED.

Exceptions noted.

JUDGE EDWARD R. KIMMEL

SERVICE OF COPY: A copy hereof was served upon:

Mr. Michael DeWine, Prosecuting Attorney, Greene County, Ohio
Mr. Steven Rowe, 45 North Wilson Road, Columbus, Ohio 43204

by mail on date of file stamp hereon.

JUL 10 1979

Court Reporter

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO,	*	
Plaintiff	*	Case No. 77 CR 186
-vs-	*	
VICTOR E. GOODE,	*	
Defendant	*	JUDGMENT ENTRY
	*	

* *

This matter was scheduled for trial by jury on the 12th day of June, 1978, the Defendant having previously been indicted on the charge of Rape [O.R.C. Section 2907.02(A)(1)]. The Defendant appeared in open court, along with his attorney Steven D. Rowe. The State of Ohio was represented by Prosecuting Attorney Michael DeWine and Assistant Prosecuting Attorney William F. Schenck.

Both counsel for the State of Ohio and for the defense were given an opportunity to question prospective members of the jury. Thereupon, a jury of twelve (12) and one (1) alternate was duly impaneled and sworn.

Opening statements were made by both the State of Ohio and by the defense. Evidence was presented by the State of Ohio. Thereupon, the State rested. A motion to dismiss was made by the defense. This motion was overruled by the Court.

The defense then presented its evidence.

Closing arguments were made by the State of Ohio and by the defense. Thereupon, the Court instructed the jury as to the applicable law. Thereupon, the jury retired to deliberate their verdict.

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On the 14th day of June, 1978, the jury returned to open court and announced that they had reached a verdict. The jury announced that they had found the Defendant guilty as charged of a violation of O.R.C. Section 2907.02(A)(1), being Rape.

The jury was then excused.

The Defendant informed the Court that he did not desire a pre-sentence investigation in this matter. Counsel for both the State and the defense were given an opportunity to make a statement to the Court. The Court inquired of the Defendant and the Defendant attorney if they had anything further to say as to why the judgment of the Court should not be pronounced against the Defendant. Both the Defendant and his attorney replied that they had nothing further to say. Thereupon, the Court found that the Defendant was in fact guilty of a violation of Ohio Revised Code Section 2907.02 (A)(1). Thereupon, the Court sentenced the Defendant to the Columbus Correctional Facility, Columbus, Ohio, for a period of not less than four (4) nor more than twenty-five (25) years. No fine was imposed in this case.

Further, it is the order of this Court that this sentence shall run consecutively with any sentence previously imposed against the Defendant and which may be re-instated due to a possible violation of parole by the Defendant.

The costs of this action are assessed against the Defendant, for which execution is hereby awarded.

The Court determined that the Defendant was entitled to a credit of one hundred seventy-five (175) days against his minimum and maximum sentence. (Computed as of 6/14/78)

It is further the order of this Court that certain items of clothing belonging to the complaining witness shall be returned to the Greene County Prosecutor's Office to be returned by the Prosecutor's Office to her. These items of clothing are: a sweater, jeans, blouse, and panties, being State's Exhibits 18, 20, 21, 22, 23. It is further the order of this Court that the Court Reporter shall cause to be made a photograph of these items to be kept by the Court Reporter as part of the permanent record of this case.

6/20/78
RMD:mld

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FILED

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO

Plaintiff, : CASE NO. 77 CR 186

-vs- :

VICTOR E. GOODE : JUDGMENT ENTRY

Defendant. :

- - -

Three issues were raised at the hearing held on behalf of the Defendant on May 12, 1978. They were as follows. One, the reduction of bond, two, a request for portions of the Juvenile Court transcript of the trial of the co-defendant, and three, an in camera discussion as to the applicability of 2907.02(D), as to the questions to be propounded by defense counsel to the complaining witness.

After hearing the arguments of counsel, the Court continued the bond at $25,000.00 (Twenty Five Thousand Dollars).

Established the guidelines under 2907.02(D) to be observed by defense counsel in questioning the complaining witness.

Overruled Defendant's request for transcript of the Juvenile Court proceedings, in particularity, the testimony of the complaining witness, Karen Sherlock and Dr. James Goldey.

The Juvenile Judge has previously denied this request under authority of Juvenile Rule 73(B).

This Court rules that in light of Juvenile Rule 73(B), which states:

> "Restrictions on use of recording or transcript. No public use sahll be made by any person, including a party, of any juvenile court record, including the recording or a transcript thereof of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court."

The request for the portions of the juvenile transcript is DENIED.

Exceptions noted.

JUDGE EDWARD R. KIMMEL

May 6, 78

Complainant was then asked personal information concering her sexual activity and the following information was gained: She is not a virgin. She is now cohabitating with her boyfriend. She averages having intercourse five (5) or six (6) times a week (only with her boyfriend). She has never been married and does take the birth control pills. She had an abortion in June of this year and the child being that of her boyfriend. At the time of the attack and time of the interview she was on her menstrual period and the last voluntary intercourse prior to the Rape was 12-8-77.

Respectfully submitted,

Det. Sgt. E.L. Wager, #106
BEAVERCREEK POLICE DEPARTMENT

ELW/dkm

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IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1980

No. 80-5920

VICTOR E. GOODE,

APPELLANT

-vs-

STATE OF OHIO,

APPELLEE

AN APPEAL FROM THE SUPREME COURT OF OHIO

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1980

No. 80-5920

VICTOR E. GOODE,

APPELLANT

-vs-

STATE OF OHIO,

APPELLEE

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

OPINION BELOW

This is an appeal from a decision of the Supreme Court of Ohio, which dismissed an appeal by the Appellant, thereby leaving the Second District Court of Appeals decision intact. The final Court of Appeals decision, rendered on April 15, 1980, was the second decision by that Court. It followed a limited reversal and remand to the trial court for the purpose of an in camera hearing to determine whether the Appellant's constitutional rights had been violated due to the inaccessibility to the Appellant of prior testimony taken in a juvenile case.

The second appeal to the Second District Appellate Court resulted in an affirmation of the Greene County Common Pleas Court's decision, upholding Appellant's conviction. Thereafter, the Ohio Supreme Court ruled that the appeal raised no substantial constitutional questions and sua sponte dismissed the appeal in an unreported decision. All relevant decisions of the state courts were filed by Appellant in his Appendix to his Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent Constitutional and Statutory provisions are set forth in the Appellant's jurisdictional statement.

STATEMENT OF THE CASE

Appellee does not take issue with the statement of the case as set forth in the Appellant's jurisdictional statement except in one aspect.

In Appellee's Memorandum Contra to a Motion for Reconsideration filed on July 17, 1979, which concerned the question of whether discrepancies existed between the testimony of the prosecutrix at trial and a prior juvenile trial, the prosecution did not admit "that there was at least one discrepancy." [Appellant's Jurisdictional Statement, at 10]. The statement which was made by the State was: "The State of Ohio conceded that the fourth alleged discrepancy may be viewed as a minor inconsistency, but certainly not of the magnitude to constitute prejudicial error." [Appendix, Memorandum Contra to a Motion for Reconsideration, at 3]. Although Appellant has consistently stated that the Appellee agrees that there are inconsistencies, the State of Ohio has stated that there are none, and that if, arguendo, they were found to exist, they are minor.

ARGUMENT

The basis of Appellant's two-pronged claim is that he was denied his constitutional rights to confront and cross-examine witnesses. Appellee readily acknowledges that those Sixth Amendment

rights apply to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1964).

First, the Appellant asserts that he was denied his Sixth Amendment rights when he was not given a transcript of the juvenile proceeding of a co-defendant. The Appellee contends that, due to the limited reversal and subsequent in camera inspection of the juvenile trial, the Appellant's constitutional rights have been addressed. There is, therefore, no further remedy necessary.

Initially, the trial court determined that Ohio's Juvenile Rule 37(B) would bar the Appellant from obtaining a copy of the testimony of two of the State's witnesses in a prior juvenile proceeding. Pursuant to State v. Cox, 42 Ohio St.2d 200 (1975), and State v. White, 15 Ohio St.2d 146 (1968), the Second District Court of Appeals held that the trial court had erred in not granting an in camera inspection of the juvenile record to determine whether inconsistencies existed. It reversed and remanded to the trial court, with instructions to order a new trial if the trial court found that there were inconsistencies, and that those discrepancies prevented the defendant from receiving a fair trial. State v. Goode, slip opinion, Case No. CA 1025, Greene County Ct. App. (April 24, 1979).

The law in Ohio is therefore consistent with the guidelines set forth in Davis v. Alaska, 415 U.S. 308 (1974). Constitutional rights of the criminal defendant cannot be submerged because of a juvenile shield statute. State v. Cox, 42 Ohio St.2d 200 (1975).

In this case, Appellant is not claiming, however, that the juvenile rule itself denied him the right of confrontation. Rather, he is insisting that his remedy was unacceptable. Pointing at a discovery rule, Ohio Criminal Rule of Procedure 16(B)(1)(g), Appellant claims that he was entitled to the transcript if any inconsistencies existed, regardless of whether they were minor.

Appellee submits that the Appellant's right to the use of a prior juvenile trial transcript is not absolute. Procedurally, Appellant is entitled to an in camera inspection and a hearing on the evidence and alleged discrepancies. Such a procedure is mandated by State v. White, supra, and is not significantly altered by the criminal rules. Here, the trial court specifically found that the testimony in both transcripts was identical as to the elements of the crime and factual description of the evening. Prior to the triggering of Criminal Rule 16(B)(1)(g), the Court must determine that inconsistencies do exist.

Appellant's argument that the remedy granted by the appellate court was ineffective is unconvincing. There were no inconsistencies in the testimony. Most of the alleged discrepancies were the result of out-of-context phrases lifted by the Defendant. Assuming, arguendo, that there were any actual discrepancies, they were so minor that the use of them could not possibly affect the credibility of the prosecuting witness.

The situation in this case is not the one addressed in Davis v. Alaska, supra, where the juvenile record itself would reveal bias. Davis did not encounter a request for a juvenile transcript. Here, the appellate court determined that Appellant's Sixth Amendment rights would be adequately protected by the remand, and Appellee submits that they were. Had discrepancies been found, Appellant would have been given a new trial. It is apparent from the appellate decision that, if such a situation were to arise in the future, the trial judge must permit an in camera examination of the juvenile transcript upon request of the defendant, and furnish the defendant with the inconsistent testimony if any should exist. Thus, the standard is set for the future, and it has not been demonstrated that the Appellant has suffered any harm by the remedial measure used.

Appellant's reference to Britt v. North Carolina, 404 U.S. 226 (1971), is inappropriate in this case. Britt involved the right of a criminal defendant to obtain a copy of his earlier trial in order to prepare for a later one. While the Appellee will agree with that right, it does not follow that a criminal defendant automatically "needs" or is entitled to a transcript of a juvenile co-defendant's trial. Davis v. Alaska, supra, suggests a balancing test, and recognizes therein that a state does have a legitimate interest in protecting the anonymity of juvenile records. The constitutional rights of the defendant and the state's interests can both be adequately protected by the procedures established by State v. White, supra, and by the appellate court in this case.

Finally, the Appellee submits that the Ohio Supreme Court, which established the Criminal Rules of Procedure, did not subscribe to the Appellant's contention that Criminal Rule 16(B)(1)(g) expanded the decision in State v. White, supra. Because there is no attack on the constitutionality of Juvenile Rule 37, or Criminal Rule of Procedure 16(B)(1)(g), and the Appellant's constitutional rights were addressed in this case, there is no federal question involved in this prong of the appeal.

Turning, then, to Appellant's second argument, Appellee will further demonstrate that there is no reason for this Court to accept jurisdiction over this case. Ohio's rape shield statute, Ohio Revised Code, Section 2907.02(D), has been attacked by Appellant as unconstitutional. Appellant attempted to introduce evidence that the victim of the rape had been living with a man, that she had intercourse with him five or six times a week, and that she had previously had an abortion. The trial court would not permit such evidence, relying upon the rape shield statute to exclude it.

Ohio's rape shield statute, as drawn and construed, requires a balancing test to determine admissibility of sexual evidence,

i.e., probative value versus prejudicial effect. O.R.C. §2907.02(D); State v. Gardner, 59 Ohio St.2d 14 (1979). It is, in essence, an evidentiary tool, and is similar to many state statutes and Federal Rule of Evidence 412. See Tanford and Bocchino, Rape Victim Shield Laws and The Sixth Amendment, 128 U. Pa. L. Rev. 544, 591-602 (1980). Such rules and statutes were enacted to protect the victim from being senselessly subjected to examination concerning irrelevant sexual history, and to aid the states and federal government in prosecuting what has traditionally been the most underreported crime---that of rape. State v. Gardner, supra. See also, Note, Rape Reform Legislation: Is It the Solution?, 24 Cleve. St. L. Rev. 463 (1975).

Obviously, there are times when the defendant's constitutional rights will outweigh the inflammatory or prejudicial effect of testimony. However, the Ohio statute is not inflexible: it allows for a hearing on the proposed evidence.

It is not, and never has been, the right of any participant in a trial to introduce irrelevant and highly emotional evidence. People v. McKenna, 585 P.2d 275 (Col. 1978). The Sixth Amendment right to confrontation does not encompass a right to introduce irrelevant material. State v. Blue, 225 Kan. 576, 592 P.2d 897 (1979). As to the issue of consent, evidence of a victim's prior unchastity is generally not probative, absent circumstances which enhance its probative value. United States v. Kasto, 584 F.2d 268 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979). In this case, the jury was made aware of the fact that the victim had been fighting with her boyfriend, and that she was very distraught. There was evidence that she was upset and that she wanted to get back to him badly enough that she was willing to hitchhike from Columbus to Oxford. Therefore, the jury knew what her mental state was on the night of the rapes. Contrary to what the Appellant has claimed,

evidence that the victim Sherlock had lived with her boyfriend, that she had had intercourse with him with frequency, and that she had had an abortion was irrelevant as to any of the issues in this case, and would have been introduced only to inflame the jury against the rape victim.

Under the facts of this case, the Appellant's constitutional right to confrontation was not infringed upon by the application of the statute in question. "The defendant's right to confront witnesses against him is not absolute, but must bow to 'other legitimate interests in the criminal trial process. Chambers v. Mississippi, 410 U.S. [284 at 295].'" State v. Mastropetre, 400 A.2d 276, 281 (Conn. 1978). Accord, People v. Thompson, 76 Mich. App. 705, 257 N.W.2d 268 (Ct. App. 1977); United States v. Kasto, supra. See also Rozell v. Estelle, 554 F.2d 229 (5th Cir. 1977), cert. denied, 434 U.S. 942 (1977). Where, as here, other means are available to impeach the witness, and are in fact used, exclusion of the inflammatory evidence is not an infringement of the rights of the defendant. It is no more relevant to inquire as to prior sexual history of the rape victim in most cases than it is to inquire about a robbery victim's prior donations to a family member or friend.

As has been amply shown by this brief supporting a Motion in the Alternative to Dismiss or Affirm, there is no reason for this Honorable Court to proceed further with this case. The Supreme Court of the State of Ohio did not err in dismissing the appeal, because neither issue herein addressed by the Appellant raises a substantial federal question. Clearly, no constitutional violation has occurred, and the rape shield statute, Ohio Revised Code, Section 2907.02(D), is not unconstitutional on its face or as applied. Therefore, Appellee's motion to dismiss should be sustained.

Respectfully submitted,

William F. Schenck
Counsel for Appellee
Greene County Court House
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion in the Alternative to Dismiss or Affirm has been forwarded, by regular U.S. mail, to Steven D. Rowe, Counsel for Appellant, at Kemp, Schaeffer & Rowe Co., LPA, 45 North Wilson Road, Columbus, Ohio 43204, on this ____ day of January, 1981.

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	Case No. 77 CR 186
-vs-	:	
VICTOR E. GOODE	:	MEMORANDUM CONTRA TO A MOTION FOR RECONSIDERATION
Defendant	:	

* *

This case comes before this Court on remand by the Court of Appeals, Second Appellate District for review of the transcript of testimony of Karen Sherlock, the primary prosecution witness for the State of Ohio in the case of State v. Goode, 77 CR 186 and State v. Mayes, 10109, Juvenile Division of the Common Pleas Court. The purpose of this review is to determine whether or not certain inconsistencies exist in the testimony of Karen Sherlock that resulted in actual prejudice to the Defendant-Appellant denying him a fair trial and due process of law.

The State of Ohio will demonstrate that each and every alleged "discrepency" or "inconsistency" in the testimony of Karen Sherlock was taken out of context from the record as a whole. In order of the Defendant's allegations, the first alleged inconsistency is that Karen Sherlock testified ~~that~~ the trial of Victor Goode, that Victor Goode and Richard Mayes did not say whether they would take her all the way to Oxford, Ohio. Defendant contends that on page 5 of the transcript of the juvenile hearing of Richard Mayes, Ms. Sherlock testified that they would take her all the way to Oxford. On page 392-393 of the transcript of the proceedings of Victor Goode, the following testimony was recorded:

BY MR. DEWINE:

Q. What conversation, if any, did you initally have with them when you got into the car?

A. I told them I was going to Oxford and asked them if they could take me part or all of the way.

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Q. Did they respond in any way?

A. They said they would.

Comparing the above testimony with that on page 5 of the transcript of the juvenile hearing, it is clear that no discrepency exists. At the trial of Victor Goode, Ms. Sherlock merely recanted that Victor Goode and Richard Mayes agreed to give her a ride. Karen Sherlock's testimony at the trial of Victor Goode was, at best, a mere general affirmation and lacked the specificity that exists on page 5 of the juvenile hearing transcript, but it certainly cannot be viewed as an inconsistency.

The second alleged inconsistency pertains to Ms. Sherlock's knowledge of the co-defendant's name. On page 6 of the juvenile court transcript, Karen Sherlock testified that she learned the names while they were at Richard Mayes' house in Columbus.

BY MR. HALLER:

Q. Did you know his name at this time?

A. Well, when he had gone into the house, the other man in the car introduced himself and then Richard Mayes. He introduced both of them. That was when I first learned their names.

At page 405 of the transcript of the trial of Victor Goo Karen Sherlock testified consistently with the statements made i juvenile court hearing; that is that Victor Goode introduced the selves at the home of Richard Mayes in Columbus. Karen did tes at Goode's trial that she learned their first names, but at May hearing she did not state whether the Defendant gave both their first and last names. This, again, cannot be viewed as an inconsistency because of the lack of preciseness in the juvenile hearing

The third discrepency the Defendant cites concerns the nature of the conversations that took place on the way toward Xenia On page 8 of the juvenile court transcript, and page 399 of the trial court proceeding, Karen specifically stated the same pieces

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of information concerning Xenia. In both transcripts it is evident that the parties talked about the tornado and Karen's past connection with the City of Xenia. No discrepency can be said to exist pertaining to the nature of that conversation.

The State of Ohio concedes that the fourth alleged discrepency may be viewed as a minor inconsistency, but certainly not of the magnitude to constitute prejudicial error. Defendant states on page 5 of his Memorandum in Support of Reconsideration that Karen Sherlock testified at the juvenile hearing that she had been sitting on the passenger side of the vehicle until they reached McDonalds in Xen.. However, Karen testified at the trial of Mr. Goode that she sat between the co-defendants earlier that morning when they stopped to purchase beverages. A careful review of page 9 of the juvenile court transcript in conjunction with page 395 of the trial testimony will reveal no substantial difference to constitute prejudicial error. The State of Ohio contends such a discrepency is harmless error. Criminal Rule 52(A). In determining whether it was harmless error, a reviewing court must read the entire record, disregarding the objectional material. If the error alleged is constitutional in nature and if the Court finds that there is overwhelming evidence of the Defendant-Appellant guilty, aside from the disputed material, then it must hold that the error is not prejudicial but harmess beyond a reasonable doubt and affirm the judgment of the trial court. Harrington v. Californi 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). In the case of non-constitutional error, the reviewing court must read the record, disregarding the objectional material and then determine whether or not this was "substantial" evidence of the Appellant's guilt before it affirms or reverses the judgment of the trial Court. State v. Davis, 44 Ohio App. 2d 335, 338 N.E. 2d 793 (1975). In the case before this Court the Defendant claims a constitutional error,

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however, this one minor inconsistency does not withstand a test for reversal or a new trial when examined against the multitude of much more significant statements. The Defendant-Appellant incurred no prejudice from this one minor instance.

The fifth alleged discrepency concerns a statement by Victor Goode. On page 13 of the juvenile court transcript the following colloquy took place:

BY MR. HALLER:

Q. So what happened then?

A. So, he continued on in this way, "Isn't there something you could do? Just turn one of us on and we will go on our way."

Q. Who was saying this?

A. Victor Goode said that. He said, "Just turn Rich on."

Q. Indicating who?

A. Richard Mayes. . .

When comparing the above testimony with page 406 of the trial court transcript it is clear that Karen Sherlock accurately and consistently repeated the statements made by Victor Goode. As a result no discrepency can be discerned from the testimony.

The sixth discrepency cited by the Defendant-Appellant, concerning the motive of dressing in the rear of the vehicle, presents a mystery to the prosecution. The State fails to understand what the alleged conflicts said to exist between page 14 of the juvenile court trial transcript and the adult trial, specifically, pages 408-410. Examination of these pages reveals the identical revelation of events at both hearings.

The seventh alleged discrepency in the testimony of Karen Sherlock, concerning Mr. Goode's request that Karen assist him in obtaining an erection, is insignificant at best. See pages 410 through 415 of State v. Goode, and page 15 of State v. Mayes.

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Regardless of when the request for assistance came, whether it be the first or second time Victor Goode was in the back seat with Karen, it cannot be said to be of any great significance. The fact of the matter is that Karen accurately revealed the events as they took place. The shock and humiliation of being raped by the two men is more than sufficient basis for allowing Karen to testify as to what happened to the best of her recollection. The law is not so rigid as to require Karen to pinpoint the exact time this statement was made.

Finally, on page 29 of the juvenile court transcript, Defendant contends that Karen's testimony that Victor Goode made no specific threats of force against Karen negates that element of the crime charged. Karen Sherlock testified that she could not specifically remember the threats of Victor Goode, however, the purposeful compelling of Karen Sherlock to submit to sexual intercourse with two men was the result of the fear of physical harm. The record reveals on pages 13-17, and 33 of the juvenile court transcript and pages 408-412 of the adult trial the fear of physical harm that Karen experienced. For example, Richard Mayes said he would hurt her, kill her even, and force her to make a decision by the time he finished his cigarette. Victor Goode tugged on Karen's injured ankle in his attempts to get her in the back seat. Both men instructed her to keep quiet and called her "a bitch" while raping her. All of these instances viewed as a whole indicate the fear that Karen experienced. She pleaded with them to leave her alone but chose to submit in an effort to save her life.

As a result, viewing the record as a whole, both transcripts it is clear that the alleged inconsistencies are non-existent. The Supreme Court found in State v. White, 27 Ohio St. 2d 73, (1971) the record does not reveal that the inconsistencies or variations

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between the statements and evidence denied the Appellant a fair trial. Applied to the case at bar, the record in this case does not reveal that any inconsistency between the testimony of Karen Sherlock at Victor Goode's trial and at Richard Mayes' hearing constituted any prejudicial error. What may be viewed as an inconsistent statement is nothing more than harmless error. No substantial rights of the Defendant were affected, nor was there prejudice demonstrated.

For the above reasons the State of Ohio respectfully requests this Court to affirm the conviction and deny the Defendant's request for a new trial.

Respectfully submitted,

Michael DeWine
Prosecuting Attorney

William F. Schenck
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to Mr. Steven Rowe, Attorney for Defendant, 45 North Wilson Road, Columbus, Ohio 43204 this 11th day of July, 1979 by regular U.S. Mail.

Michael DeWine

MD/djh

7/11/79

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